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No. ____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ASPEN SKIING COMPANY,

Petitioner,

v.

ASPEN HIGHLANDS SKIING CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

EDWARD BENNETT WILLIAMS
HAROLD UNGAR
(Counsel of Record)
RICHARD M. COOPER
STEVEN R. KUNEY
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000
Attorneys for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

1. Whether under § 2 of the Sherman Act a firm with market power can be found to have a duty to cooperate with its smaller rivals in a court-ordered scheme of mandatory joint marketing?

2. Whether a firm can be found to have violated § 2 of the Sherman Act under the "essential facilities" or "bottleneck" doctrine not by denying a competitor access to an input necessary to its production process, but rather by refusing to combine with the competitor in the joint marketing of both firms' output to the public?

3. Whether a firm's refusal to participate in a joint marketing scheme demonstrates an unlawful intent to create or maintain a monopoly, in violation of § 2 of the Sherman Act?

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ASPEN HIGHLANDS SKIING CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Aspen Skiing Company petitions for a writ of certiorari to review the judgment of the United States Court of Appeals For The Tenth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals, thus far reported only at 1984-2 Trade Cas. (CCH) ¶ 66,101 (10th Cir. 1984), is reproduced at App. 1a.

JURISDICTION

The judgment of the Court of Appeals (App. at 40a) was entered July 13, 1984. By order of July 31, 1984 (App. at 41a), the Court of Appeals stayed its mandate until September 2, 1984. By order of August 28, 1984 (App. at 42a), that Court further stayed its mandate until October 2, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

United States Code, Title 15

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

Aspen Highlands Skiing Corp. ("Highlands"), operating skiing facilities on one of the four mountains near Aspen, Colorado, brought this suit under § 4 of the Clayton Act against Aspen Skiing Corporation and its two wholly-owned subsidiaries, operating the facilities at the other three mountains. The defendant enterprise was later reorganized into a partnership, Aspen Skiing Company ("Ski Co."), which was then substituted as the defendant in the action and, for simplicity's sake, will be treated herein as having been the defendant at all relevant times. Highlands charged that Ski Co. violated § 1 and § 2 of the Sherman Act by monopolizing and conspiring to monopolize the sale of downhill skiing services in Aspen, Colorado.

The lawsuit focused on Highlands' contention that Ski Co. was obligated to cooperate with Highlands in jointly offering certain ski-lift tickets to the public. Both Highlands and Ski Co. had for years separately offered a wide variety of lift tickets—single-day, multiple-day and combinations of skiing and other services, such as instruction. Ski Co.'s tickets were generally interchangeable among its three mountains.

Beginning with the 1962-63 ski season, Highlands and Ski Co. had also offered a joint, multi-day ticket usable at either company's facilities, regardless of which one sold the ticket. Revenues from the joint ticket were divided through a series of devices for estimating the usage of each firm's facilities. In 1975 the Attorney General of Colorado had filed suit in federal court challenging the joint ticket as anticompetitive, in part because it tended to facilitate price fixing. The suit was settled by a consent decree, in which Highlands and Ski Co. agreed to limit their consultations and discussions if they again offered the joint ticket.

The companies did temporarily resume their joint offering. For the 1977-78 season, revenues from the joint ticket were split according to an agreed percentage. In the spring of 1978, Ski Co. offered Highlands a lower percentage, whereas Highlands demanded a measured-use basis of revenue-sharing. Ultimately the parties were unable to agree, and no joint ticket was offered thereafter. Highlands alleged that the negotiations failed because the revenue-sharing offer Ski Co. had made was one that it knew to be unacceptable.

This alleged refusal by Ski Co. to join with Highlands in offering a joint ticket was the basis of Highlands' claim of monopolization under § 2 of the Sherman Act. The jury rejected Highlands' conspiracy claim under § 1, but found for Highlands on its claim that Ski Co. had monopolized the submarket of skiing in Aspen. Highlands was awarded $2.5 million in damages, which was trebled to $7.5 million.

On appeal Ski Co. challenged, among other things, the sufficiency of the evidence to support a verdict of monopolization. The Court of Appeals for the Tenth Circuit, however, held that the case presented facts sufficient to support a monopolization claim under the essential facilities doctrine or as a refusal to deal motivated by an improper intent. The court let stand both the judgment for damages and an injunction requiring Ski Co. to join with Highlands in offering tickets usable at either company's facilities.

Ski Co. does not advance any business justification for its refusal to cooperate, other than a desire to compete rather than cooperate with a well-established business rival. Thus this case squarely presents the question whether a refusal to cooperate for that reason is lawful and socially desirable pro-competitive conduct or is monopolization in violation of § 2.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit observed that the question of when a firm with market power "has a duty to cooperate or deal is one of the most 'unsettled and vexatious' issues in antitrust law," App. at 16a-17a, citing *Byars* v. *Bluff City News Co.*, 609 F.2d 843, 846 (6th Cir. 1979), but its decision only further confounds a number of important questions in the law of monopolization. Indeed, the

court's very statement of the problem suggests the profound flaws in its approach. The court perceived no distinction between the "refusal to deal" familiar to antitrust law and its own novel concept of a horizontal "refusal to cooperate."[1] From that seemingly innocuous starting point, however, the court of appeals derived a *duty of mandatory cooperation among competitors*, under which a firm with market power, if it declines to market its services jointly with its smaller rivals, violates the Sherman Act. The court did not explore the serious dangers this new duty presents to the policy of competition that is the foundation of antitrust law.

None of the authority relied upon can support such a remarkable result. The court of appeals has departed significantly from the decisions of other courts and put itself in conflict with them as to the application of the so-called "bottleneck" or "essential facilities" doctrine. It has also aggravated the growing confusion and conflict among the circuits in its exposition of the proper role of intent in cases alleging monopolization under § 2 of the Sherman Act. And it has lost sight of the fundamental policy of the Sherman Act—the promotion of competition among business rivals—in favor of its own view of circumstances in which cooperation among firms is the preferred policy. A writ should issue to enable this Court to define more clearly these important doctrines in the law of monopolization and to ensure that the interpretation of the Sherman Act is not turned on its head.

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[1] *Byars* involved a classic "essential facilities" or "bottleneck" problem: in an industry with two vertically divided wholesale distribution markets, a firm with a regional monopoly in the first market denied product to a small firm seeking to compete with it in the second market.

I. The Court Of Appeals' Decision Creates A New Duty To Cooperate By Marketing Jointly With One's Competitors.

The court of appeals starts from the premise that this case concerns a refusal to deal *or to cooperate*. App. at 16a-17a. This reference to a "refusal to deal" gives the appearance of anchoring the court firmly in Sherman Act precedent, despite the unfamiliarity of the court's concept of a refusal to *cooperate*. It soon becomes clear, however, since there was no refusal to deal here in any sense heretofore recognized, that the court's newly fashioned *duty to cooperate* breaks fresh ground. By upholding a verdict of monopolization based on a firm's refusal to continue jointly marketing services with a smaller competitor, the court departs from both the precedent and the policies underlying the law of monopolization.

Unilateral refusals to deal by firms with monopoly power—that is, refusals to buy from a certain potential supplier or to sell to a certain potential customer—have been proscribed in several well-defined situations. A firm with monopoly power over a product or service essential to other firms may not, for example, refuse to sell that product or service to those firms merely because they are also competitors.[2] Nor may such a firm seek to exclude competition by refusing to buy from or sell to those who trade with its competitors.[3] The touchstone of illegality in these cases is conduct which unreasonably excludes competition or which utilizes monopoly power gained in one market to distort or limit competition in another market.

The Tenth Circuit has held here, under its newly created "duty to cooperate," that a large firm's refusal to

[2] *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359 (1927).

[3] *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951) (newspaper could not refuse to print advertising of those who also advertised on competing local radio station).

yield to its smaller competitor's demand for joint marketing can constitute illegal monopolization. Section 2 of the Sherman Act has somehow become the vehicle for court-imposed cartelization.

Obviously, the antitrust laws were never intended to encourage, let alone mandate, such a result. The lines of authority ostensibly relied upon by the court of appeals do not support any such conclusion. But wholly apart from the specific flaws in the court's analysis of this case, it must be clear that under no analysis and no set of circumstances can the Sherman Act give rise to a duty to cooperate in joint marketing (including joint fixing of prices and other terms of sale).

Antitrust law has always been suspicious of joint marketing arrangements among rival firms,[4] and for good reasons. First, joint marketing dulls the incentive to compete. More efficient firms will be less motivated to exploit their advantages by improving their products and lowering their prices if they must share the fruits of that exploitation with their less efficient competitors who undertake no such measures. Second, since at least Adam Smith's *The Wealth of Nations*, it has been understood that competitors' get-togethers to discuss marketing may sooner or later lead to discussions of other topics, including prices. From the perspective of antitrust enforcement, such get-togethers are dangerous and should be discouraged by the law, not mandated by it. Third, where, as here, a district court puts itself in the position

[4] "The joint sales agency is a classic cartel device." J. Brodley, *Joint Ventures and Antitrust Policy*, 95 Harv. L. Rev. 1521, 1555 n.107 (1982). *See National Collegiate Athletic Ass'n* v. *Board of Regents*, 104 S.Ct. 2948, 2966-69 (1984); *cf. Alexander* v. *National Farmers Organization*, 687 F.2d 1173, 1182 (8th Cir. 1982), *cert. denied*, 103 S.Ct. 2108 (1983) (the Capper-Volstead Act, 7 U.S.C. § 291, confers antitrust immunity on the joint marketing activities of farm cooperatives).

of supervising mandatory cooperation among competitors, the court steps outside its proper role and assumes powers of economic management analogous to those of the old NRA codes treated in *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935).

These problems are clearly evident in the joint marketing that the court of appeals has mandated, Indeed, they are in many ways accentuated by the district court's role as enforcer of the joint conduct. Ski Co.'s incentive to operate more efficiently will surely be diminished by the court's requirement that it share the benefits of its efficiency with Highlands.[5] It is equally manifest that the discussions between the two firms will involve prices—certainly, the price of the court-mandated joint ticket. Moreover, Ski Co. will be deterred from trying to gain new consumers by *reducing* its own single-day and multi-day 3-area ticket prices, lest it be accused of undermining the multi-day, joint 4-area ticket the court has ordered it to offer. Indeed, by any significant efforts to attract consumers to its three mountains, Ski Co. runs the risk of being held in contempt for detracting from the value of the judicially-mandated joint ticket. The competitive process here has been sorely attenuated.

There is simply no basis for reading the Sherman Act as the court of appeals has done here to impose a duty to cooperate through joint marketing. The law designed to preserve competition was never meant to be the basis for a legal obligation to participate in a cartel. The court of

[5] The sharing of revenues from the mandatory joint ticket means that some of the revenue from additional consumers attracted to Aspen by either firm's improvements will go to the other firm. Moreover, these effects do not cancel out. Rather, they leave *both* firms with less incentive to efficient conduct because each must bear the full cost, but receive less than the full benefit, of its own product and marketing improvements.

appeals' newly created duty to cooperate in joint marketing is in fundamental philosophical conflict with the cases decided by this Court and by other courts of appeals[6] and should be unequivocally rejected.

II. The Court Of Appeals' Decision Creates An Unwarranted Expansion Of The "Essential Facilities" Doctrine

The court of appeals has not only reached a conclusion that is anathema to the Sherman Act, but it has done so in a manner that distorts the "essential facilities" or "bottleneck" doctrine. This Court's opinion in *United States* v. *Terminal R.R. Association*, 224 U.S. 383 (1912), first articulated the principle that a firm or group of firms with monopoly control of a facility necessary to their competitors' business may have a duty to make that facility available to those competitors on reasonable terms. In that case the railroads controlling western terminal access to St. Louis were required to make terminal services available to competing railroads.

This so-called "essential facilities" or "bottleneck" doctrine has since been recognized as a limit on the freedom of firms with monopoly power to choose their customers.

[6] "The central message of the Sherman Act is that a business entity must find new customers and higher profits through internal expansion—that is, by competing successfully rather than by arranging treaties with its competitors." *United States* v. *Citizens & Southern Nat'l Bank*, 422 U.S. 86, 116 (1975); *MCI Communications Corp.* v. *AT&T*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 104 S.Ct. 234 (1983); *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 281 (2d Cir. 1979), *cert. denied*, 444 U.S. 1095 (1980) (". . . a monopolist is permitted, and indeed encouraged, by § 2 to compete aggressively on the merits . . ."); *California Computer Products, Inc.* v. *IBM*, 613 F.2d 727, 744 (9th Cir. 1979); see also *In re IBM Peripheral EDP Devices Antitrust Litigation*, 481 F. Supp. 965, 991, 1022 (N.D. Cal. 1979), *aff'd sub nom. Transamerica Computer Co.* v. *IBM*, 698 F.2d 1377 (9th Cir.), *cert. denied*, 104 S.Ct. 370 (1983). 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 738m, at 286 (1978).

The doctrine has been held to apply when (1) an essential facility is controlled by a firm with monopoly power, (2) a competitor cannot reasonably duplicate the facility, and (3) the firm with monopoly power denies use of the facility to a competitor, even though (4) the facility could feasibly have been made available to that competitor.[7] Thus, an existing professional football franchise that controlled a city's only stadium suitable for professional sports could not prevent potential rival football franchises from using the stadium.[8] An electric utility could not refuse to "wheel" power to firms intending to compete with it at the retail level.[9] And a firm with virtually absolute control of local telephone service could not deny local interconnections to firms seeking to offer competing long distance telephone service.[10] The evil being prevented in every one of these cases is the same—the use of monopoly power in the monopolized market to distort or exclude competition in another market.[11]

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[7] *See MCI Communications Corp.* v. *AT&T*, 708 F.2d at 1132-33.

[8] *Hecht* v. *Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978). *See also Fishman* v. *Wirtz*, 1981-82 Trade Cas. (CCH) ¶ 64,378 (N.D. Ill. 1981).

[9] *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973).

[10] *MCI Communications Corp.*, 708 F.2d at 1132-33. *See also United States* v. *AT&T*, 1981-82 Trade Cas. (CCH) ¶ 64,277 at 74,231-35. (D.D.C. 1982).

[11] *See MCI Communications Corp.*, 708 F.2d at 1132 ("A monopolist's refusal to deal under these circumstances is governed by the so-called essential facilities doctrine. Such a refusal may be unlawful because a monopolist's control of an essential facility (sometimes called a 'bottleneck') can extend monopoly power from one stage of production to another, and from one market into another."

The issue is not, as the court of appeals suggests, whether all bottleneck cases involve vertical integration. App. at 15a-16a. It is a fact that virtually all of the reported essential facility cases involve markets which stand in a vertical relationship to one another. This is so because typically the monopolist controls an "input" or "supply" without which his competitors cannot bring their products to market. The key issue in application of the "essential facilities" or "bottleneck" doctrine is whether monopoly power in one market or one stage of production/distribution is used to distort competition in another market or stage of production/distribution.

The court of appeals seeks to transform this traditional rule against unwarranted exclusion into the basis for its newly created obligation to market services jointly with one's competitors. Ski Co.'s operation apparently enabled it to offer more of something consumers valued—perhaps quality, perhaps variety of skiing experiences[12]—than its smaller competitor could offer. The court of appeals somehow deduced from this fact that Ski Co.'s operation of three of Aspen's four mountains was sufficiently analogous to the *Terminal Railroad* situation to justify invoking the "essential facilities" doctrine. App. at 20a-21a. Therefore, it held that Ski Co.'s refusal to cooperate by sharing its greater quality and variety of services with its competitor through jointly marketed tickets could constitute monopolization under § 2 of the Sherman Act.

In so doing the court of appeals lost sight of both the factual and logical underpinnings of the "essential facilities" doctrine. The court implicitly acknowledged, but refused to be deterred by, its inability even to identify any essential facility in this case.[13] Operating more than one mountain is without question not essential to this business generally—there are numerous locations at which ski firms operate only one mountain. Even within Aspen, essentiality was never demonstrated,[14] or even

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[12] See note 14 *infra*.

[13] The court's use of "facility" in quotes to refer to Ski Co.'s operation of three mountains (App. 21a) is the only analysis offered of what should have been the decisive consideration.

[14] The court, for example, ignored, although it noted, Highland's claim that the variety of skiing offered on its single mountain was no

defined. Perhaps Highlands would have been more profitable if it operated several mountains or if a joint ticket were utilized. Multiple mountain operation may in that sense be "useful" or "advantageous." But that surely is insufficient to justify labeling defendant's three mountains an "essential facility," as that term has been used heretofore—that is, as something without which the excluded party cannot function in the market.[15]

A simple, but valid, way of determining whether a particular facet of a defendant's business is an "essential facility" is to ask the question: What effect would there be upon the plaintiff if that facet of the defendant's business should simply disappear? If it would make the plaintiff's entry or survival in the business impossible—*e.g.*, the only terminal by which a railroad could enter a city, or the only stadium in a city in which a professional football team could play—then the facility in question is "essential." On the other hand, if elimination of the defendant's facility would in no way hurt the plaintiff's ability to produce and

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less than defendant offered on its three mountains. App. at 27a, n.20. The Tenth Circuit nevertheless found multiple mountains, virtually by definition, to be essential to the offering of multi-mountain tickets, but that is about as far as the court went in analyzing the meaning of "essential."

[15] The court's erroneous identification of Ski Co.'s three mountains as an "essential facility" may have resulted from its failure to examine the underlying market itself. While the trial court permitted the jury to hold, on the basis of ample evidence, that the *relevant market* (geographic and product) was destination ski resorts in North America, it permitted the jury also to hold that the *relevant submarket* (geographic and product) was downhill skiing services in Aspen, including multi-area, multi-day lift tickets. The court below did not consider the issue concerning these anomalous conclusions because it held that it was not adequately preserved at trial. App. at 5a-12a. We mention the issue here only to suggest a possible cause of the otherwise unaccountable decision of the court of appeals.

market its product—*e.g.*, if Ski Co.'s three mountains were by some geologic magic blended into a single mountain—then the facility could not be called "essential." Indeed, in this case, such disappearance would particularly benefit Highlands by making it more competitive with Ski Co. That fact demonstrates what Highlands' complaint really is—not that Ski Co. denied it on "essential facility," but that Ski Co. is too effective a competitor.

The court's failure to require that the facility be truly essential flowed from its failure to appreciate that the "essential facilities" doctrine is designed to proscribe unreasonably exclusionary conduct, and not to redress competitive disadvantage. The doctrine prevents use of monopoly power to prevent would-be rivals from obtaining the *inputs* without which they cannot produce or deliver a competing product or service. But in this case Highlands sought no reasonable access to any "input" controlled by its larger rival. Rather it sought to make use of the leading firm's *output*—its more attractive, more varied service offering. Highlands did not seek to unclog a bottleneck at all, but rather to piggyback upon Ski Co.'s more desirable service by being allowed to market it to the public in a package with its own, less attractive offering.[16]

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[16] In *MCI Communications Corp.*, *supra*, the court recognized and rejected a similar claim. Plaintiff claimed that AT&T had wrongly denied it access both to its local telephone lines and to its long distance network (so-called "multipoint service"). The court agreed that AT&T could not use its monopoly power over *local* telephone service to deny its *long distance* competitors connections to local telephone service without which they could not operate. This was an application of classic "essential facilities" doctrine. 708 F.2d at 1132-33. But the court flatly rejected the claim that AT&T had to share its entire long distance network with its smaller long distance competitors who currently lacked the ability to serve much of the country. The court labeled plaintiff's claim to such an entitlement "troubling"

The potential for mischief created by this twisting of the essential facilities doctrine is enormous. A court following the Tenth Circuit's ruling could label as "essential" any of a firm's facilities giving it an attribute important to consumers and then require that those facilities be shared with would-be rivals. Bigger firms often have achieved advantages consumers value—lower (non-predatory) prices made possible by economies of scale, the convenience of more locations and more extensive facilities for credit and after-sale services, the variety of a broader product line, or the capability of keeping one step ahead of other firms' technology. Smaller rivals may now, under the rule laid down here, insist that those firms share those advantages with them or risk treble damage liability. Given the court's failure to define any boundaries on what constitutes an "essential facility," the potential uses of this new doctrine are dangerous to competition.

This Court should avoid this danger by clearly specifying the boundaries of the "essential facilities" doctrine. First, the facility must be truly "essential," and not simply "useful" or "advantageous" to firms lacking access to it. Without such access, in short, the excluded firms must be

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and squarely held that AT&T's refusal to share its long distance network with its long distance competitors could not be a basis for liability under § 2. *Id.* at 1148-49. *See also Berkey Photo*, 603 F.2d at 284-85 (refusing to find liability in case of claim that large firm was obligated to share its product innovations with its smaller rivals).

The impediment to MCI's claim was that the evil being prevented in bottleneck cases is the use of monopoly power in one market to distort competition elsewhere. In this aspect of *MCI*, as in the instant case, there is no second market in which competition is being distorted—in the market in which they both operate, the weaker firm simply wants to borrow some of the strength of its larger rival and sell it as its own.

unable to function in the market. Second, the doctrine can be applicable only if a firm seeks to exercise monopoly control over some "input" needed by its would-be rivals. It is not applicable where smaller firms seek to borrow the superior products or services of their dominant rivals and amalgamate them with their own for marketing to the public.[17]

III. The Court Of Appeals' Decision Aggravates The Existing Confusion As To The Proper Role Of Intent In Monopolization Cases.

Another of the court of appeals' grounds for its finding of monopolization was that a firm with market power may not choose with whom it wishes to deal if its purpose is to "create or maintain a monopoly." App. at 18a.[18] The court found its authority for this proposition in a line of unilateral-refusal-to-deal cases not involving essential facilities. And it purported in this regard to be following the Seventh Circuit, which, in analyzing a similar question in *MCI Communications Corp.*, had noted: "These cases focus on the intent and competitive effect of the refusal to deal . . . ." 708 F.2d at 1148.

Here, however, the court of appeals ignored the *competitive effect* aspect of these cases and looked only to what it perceived to be the leading firm's subjective intent: "We likewise feel there was sufficient evidence for a

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[17] In every "bottle neck" or "essential facilities" case decided to date, the plaintiff sought to buy some input from the defendant. In the instant case, by contrast, Highlands sought not to buy anything from Ski Co., but rather to sell lift tickets, jointly with Ski Co., to the public.

[18] The court of appeals purported to follow *United States* v. *Colgate & Co.*, 250 U.S. 300, 307 (1919). *Colgate*, however, involved a refusal to sell to a customer, not a refusal to participate with a competitor in a joint marketing arrangement.

finding against defendant on the basis that defendant's intent in refusing to market a multi-day multi-mountain ticket with plaintiff was to 'create or maintain a monopoly.' " App. at 22a, quoting *Colgate*. In so doing, the court never acknowledged the basic differences between the refusal-to-deal cases upon which it relied and Ski Co.'s refusal to market jointly. The court thus upheld a jury verdict of monopolization because of the intent that a firm with market power supposedly demonstrated in deciding to sell independently of, rather than in conjunction with, its smaller rival.[19]

This remarkable conclusion stems in part from the long-standing confusion over the proper role of intent in monopolization cases. It has been repeatedly stated that it takes something beyond the mere possession of market power to constitute the offense of monopolization under § 2 of the Sherman Act.[20] But the courts have struggled to articulate precisely what that something is and what role, if any, intent plays in the inquiry. Lacking clear guidance from this Court, they have adopted different and often inconsistent approaches.

Several courts have resolved this problem by rejecting the intent question entirely in favor of a more "objective,"

[19] The court of appeals also ignored the fact that the jury had been instructed that no such anticompetitive intent need be found. The court of appeals, in short, sought to save the verdict by inferring from it a finding that the jury had expressly been told it need not make and, therefore, did not make. The court of appeals dismissed this argument because no objection had been made to this instruction. App. at 22a n.16. But the court misses the point: it is not that the instruction was objectionable, but merely that the instruction, having been given, necessarily limits the inferences the reviewing court may draw from the verdict.

[20] *See, e.g., Standard Oil Co.* v. *United States*, 221 U.S. 1, 62 (1911) (Sherman Act does not condemn "monopoly in the concrete"); *United States* v. *Grinnell Corp.*, 384 U.S. 563, 571 (1966).

conduct-oriented approach. The Sixth Circuit, for example, has declared its unwillingness to draw any line between general intent and specific intent in assessing the activities of firms with market power: "However one characterizes the approaches used, we think it clear that what should matter is not the monopolist's state of mind, but the overall impact of the monopolist's practices."[21] The Ninth Circuit has declared the test to be "whether the defendant's acts, otherwise lawful, were *unreasonably* restrictive of competition."[22] Similarly, the Fifth Circuit has held that § 2 is violated only if a firm acts in "an unreasonably exclusionary manner" toward its competitors.[23]

Other circuits have been less willing to abandon the intent inquiry in § 2 cases. The First Circuit, while apparently endorsing the Sixth Circuit's view that what ultimately matters is competitive impact, has also noted that monopolization can be found "[w]hen the foreseeable and proximate consequence of defendant's conduct was unreasonably to perpetuate an already existing monopoly by excluding a potential competitor . . . ."[24] The Eighth Circuit has read this Court's opinions as indicating that illegal monopolization occurs if there is *either* a specific intent to monopolize *or* some anticompetitive effect of the dominant firm's actions.[25]

[21] *Byars* v. *Bluff City News Co.*, 609 F.2d 843, 860 (6th Cir. 1979).

[22] *California Computer Products, Inc.* v. *IBM*, 613 F.2d 727, 735-36 (9th Cir. 1979) (emphasis by court).

[23] *Mid-Texas Communications Systems* v. *AT&T*, 615 F.2d 1372, 1387 (5th Cir.), *cert. denied*, 449 U.S. 912 (1980).

[24] *Home Placement Service* v. *Providence Journal Co.*, 682 F.2d 274, 281 (1st Cir. 1982), *cert. denied*, 103 S.Ct. 1279 (1983).

[25] *Paschall* v. *Kansas City Star Co.*, 727 F.2d 692, 696 (8th Cir. 1984); *see, however, Trace X Chemical, Inc.* v. *Canadian Industries, Ltd.*, 1984-2 Trade. Cas. (CCH) ¶ 66,089 at 66,077 (8th Cir. 1984).

The trial courts have understandably expressed concern over the "inconclusiveness of the judicial decisions" as to "the applicable standard of intent."[26] And the commentators have observed that the problem is one of "loose language . . . [Courts] have focused on conduct while talking about intent."[27] These inconsistencies in approach and variations between what the courts say and what they do have greatly complicated the difficult task in all § 2 cases: preventing monopolistic abuses without depriving large firms of the opportunity to compete.[28]

The decision in this case shows the potential for confusion and unpredictability if this problem is not addressed by this Court. The court below hopelessly confounded any meaningful analysis of intent and conduct by lifting intent language out of context from cases involving conduct wholly different in competitive effect from the conduct at issue here.[29] The question the court mechanically asked was whether Ski Co. had refused to cooperate

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[26] *Becker* v. *Egypt News Co.*, 548 F.Supp. 1091, 1097 (E.D. Mo. 1982), *aff'd*, 713 F.2d 363 (8th Cir. 1983).

[27] 3 P. Areeda & D. Turner, *Antitrust Law*, § 626a at 77 (1978).

[28] As Judge Learned Hand put it in *United States* v. *Aluminum Co.*, 148 F.2d 416, 430 (2nd Cir. 1945): "[A]lthough . . . the result may expose the public to the evils of monopoly, the Act does not mean to condemn the resultant of those very forces which it is its prime object to foster: finis opus coronat. The successful competitor, having been urged to compete, must not be turned upon when he wins."

[29] Businesses typically sell their products and services to those willing and able to buy. Courts may therefore question the motivation of leading firms who refuse to deal with particular customers. But in this case such skepticism is wholly unwarranted because Ski Co. has not refused to deal with any potential buyer of its services. Ski Co. has only refused to enter into a joint marketing arrangement with a competitor. Businesses do not normally market products jointly with their rivals, and their refusal to do so cannot properly be deemed to be evidence of unlawful intent.

in a joint marketing arrangement with a smaller competitor with the intent to "maintain or create a monopoly." In some almost axiomatic sense, Ski Co. may well have had this intent—it may well have rejected joint marketing because it believed that the joint ticket was helping Highlands more than Ski Co. To the extent that declining to aid its smaller competitor would necessarily have preserved Ski Co.'s position in the market, the firm could be said to have "intended" to maintain "monopoly" power.

But this case thus illustrates one of the fundamental problems about looking to intent to determine the boundary of allowable conduct for firms with monopoly power: defining what intent ought to be proscribed. All firms, including those with market power, typically seek to maintain or expand their market shares by a host of practices that are unquestionably legitimate, from lowering their prices to improving the attractiveness of their products. In a sense, all these firms intend to "create or maintain a monopoly"—they want to enhance their own position in the market, and they understand that their growth is inevitably at the expense of their rivals. That desire and that knowledge alone cannot turn normal business behavior into monopolization.

There is no meaningful way for a court to distinguish between the thoughts articulated by those who aim to succeed at competition and the thoughts of those who would destroy it. Nor can the courts articulate in advance what line they intend to draw.[30] The key can only be found in the effect of the defendant's behavior, and not in the

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[30] *See, e.g., Cascade Cabinet Co.* v. *Western Cabinet & Millwork, Inc.*, 710 F.2d 1366, 1372 (9th Cir. 1983) ("Although Timberland may have acted with the motive of making things difficult for Cascade, such subjective intent does not constitute anticompetitive purpose within the meaning of our prior cases.").

subjective mental processes of various of its corporate officials.[31] Focusing on conduct will help ensure that truly anticompetitive acts do not go uncorrected merely because the evidence fails to demonstrate that the dominant firm had the requisite monopolistic intent. And, it will yield more comprehensible and rational results than trying to draw a non-existent line between the intent to compete and the intent to create or maintain a monopoly.

Such a movement to a conduct-oriented approach has already occurred in another important area of the law of monopolization—the area of predatory pricing:

> In addition, a test based wholly on intent is unworkable. Even if it were possible to identify those persons within a firm whose intentions are relevant, the meaning of the evidence will usually be obscure. After all, competition consists of winning business from rivals. The intent to preserve or expand one's market share is presumptively lawful. To encourage judges and juries to rely overly on nonprobative data allegedly bearing on a firm's "state of mind" invites the twin mischiefs of (1) burdening litigation with thousands of documents about the firm's motives and calculations; and (2) encouraging inconsistent and quixotic results. Areeda, *Predatory Pricing (1980)*, 49 Antitrust L.J. 897, 899 (1980); see R. Posner, [Antitrust Law (1976)] *supra*, at 189-90.

MCI Communications Corp., 708 F.2d at 1113.[32]

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[31] There will be cases in which examining those thought processes may help the trier of fact determine whether the conduct at issue had an unreasonably anticompetitive effect. *Berkey Photo*, 603 F.2d at 288. Where the competitive effects of specific conduct are difficult to determine, that use of intent has been informative, *see, e.g., Ass'n for Intercollegiate Athletics for Women* v. *NCAA*, 735 F.2d 577, 583 (D.C. Cir. 1984), and we raise no question about it here.

[32] *See also Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F.2d 227, 232 (1st Cir. 1983) ("Thus, most courts now find their standard, not in intent, but in the relation of the suspect price to the firm's costs.").

That same rationale applies to monopolization cases generally, as this case all too clearly demonstrates. The intent inquiry has proven itself to be a pointless and time-consuming process, encouraging irrational results. It is like the astronomers' black hole, which absorbs whatever is brought near it but from which nothing, not even light, emerges. Some lower courts have attempted to remedy this problem on their own, but this Court's guidance on this fundamental issue is sorely needed.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

EDWARD BENNETT WILLIAMS
HAROLD UNGAR
RICHARD M. COOPER
STEVEN R. KUNEY
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
Attorneys for Petitioner

September 1984

APPENDIX

UNITED STATES COURT OF APPEALS
THE TENTH CIRCUIT

Nos. 82-1407
and 82-1424

ASPEN HIGHLANDS SKIING CORPORATION,
a Delaware Corporation,
Plaintiff-Appellee,
Cross-Appellant,

v.

ASPEN SKIING COMPANY,
a Colorado General Partnership,
Substituted Defendant-Appellant,
Cross-Appellee.

FILED
United States Court of Appeals
Tenth Circuit
July 13, 1984
HOWARD K. PHILLIPS
Clerk

APPEAL FROM THE
UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO
(D.C. NO. 79-Z-1012)

Tucker K. Trautman, (John H. Evans and Owen C. Rouse of Ireland, Stapleton & Pryor, P.C., Denver, Colorado, were also on the brief) for Plaintiff-Appellee, Cross-Appellant

Richard M. Cooper (Edward Bennett Williams and Harold Ungar of Williams & Connolly, Washington, D.C., and David G. Palmer and William W. Maywhort of Holland & Hart, Denver, Colorado, of counsel, were also on the brief) for Substituted Defendant-Appellant, Cross-Appellee

Before HOLLOWAY, DOYLE and SEYMOUR, Circuit Judges

HOLLOWAY, Circuit Judge

Defendant Aspen Skiing Company operates skiing facilities at three of the four skiing mountains in the Aspen, Colorado area, Ajax Mountain, Buttermilk and Snowmass. Plaintiff Aspen Highlands Skiing Corporation operates skiing facilities at the fourth mountain, Aspen Highlands.

For many years, plaintiff and defendant individually offered a wide variety of ski-lift tickets. Defendant's ski-lift tickets were interchangeable among its three Aspen facilities. From the 1962-63 ski-season through the 1971-72 season, plaintiff and defendant offered a joint multi-day ski-lift ticket which could be used at any of the four Aspen mountains. Revenues from the joint ticket were divided through coupons used to measure actual use at the four mountains. II App. 488-49.[1] After a one-year discontinuance of the joint ticket during 1972-73, the joint ticket was reinstituted in 1973-74 through 1976-77. Profits were divided on the basis of surveys of actual use. Plaintiff received 17.5% of the net revenues from the sale

[1] Citations to "App." refer to the joint appendix on appeal prepared by the parties. Citations to "R." refer to the original record.

of four-area tickets during 1973-74, 18.5% in 1974-75, 16.8% in 1975-76, and 13.2% in 1976-77.

Defendant offered to continue the joint ticket for 1977-78 if plaintiff would accept a 13.2% fixed percentage of the revenues. I App. 90-91. Plaintiff objected to this percentage because it was based on the survey for 1976-77, which plaintiff contended was a ski-season marked by below average amounts of snowfall and an unusually low number of skiers visiting the Aspen area. *Id.* at 91. Although plaintiff wanted revenues to be divided on the basis of actual usage, it eventually accepted a fixed 15% of revenues for 1977-78. *Id.* at 92-93.

Defendant offered to continue the joint ticket for 1978-79 if plaintiff would accept 12.5% of revenues. *Id.* at 145-46. Plaintiff again urged a return to a system of sharing revenues on the basis of actual usage. *Id.* at 73, 77-78. The parties were unable to agree and no joint tickets were offered thereafter.

Plaintiff brought suit against defendant under § 4 of the Clayton Act, 15 U.S.C. § 15. Plaintiff alleged that defendant violated §§ 1 and 2 of the Sherman Act, 15 U.S.C. § 1 and 2, by monopolizing, attempting to monopolize, and conspiring to monopolize the sale of downhill skiing services in Aspen, and by conspiring to restrain trade.

After the close of the evidence at trial, the district court granted defendant's motion for a directed verdict with respect to all of plaintiff's claims except the claims of unlawful monopolization and conspiracy to restrain trade between defendant and nonparties.

The jury found for plaintiff on the monopolization claim and for defendant on the conspiracy claim. II App. 603; I App. 31-32. The jury by special interrogatories found that the relevant product market was downhill skiing at

destination ski resorts and that the relevant product submarket was downhill skiing services in the Aspen area, including multi-area and multi-day lift tickets. The jury also found that the relevant geographic market was North America and that the relevant geographic submarket was the Aspen area. I App. 30-31, II App. 601-02. The jury found that plaintiff had suffered $2.5 million in damages by defendant's unlawful monopolization. I R. 33, II App. 603.[2]

The district court thereupon trebled the verdict and entered judgment of $7.5 million plus attorneys' fees and costs. I App. 35, II App. 607. The court also issued an injunction requiring defendant to participate with plaintiff in offering a joint four-area six-day ski-lift ticket for a period not exceeding three years. I App. 36-40. The district court denied motions for judgment notwithstanding the verdict, for a new trial, and for remittitur filed by defendant both after trial and seven months later. I R. 294, 296. The district court issued an order fixing the

[2] On December 22, 1975, the Attorney General of Colorado brought an antitrust suit under federal law against both plaintiff and defendant challenging, among other things, the joint ticket offered by the parties. Exhibit X, III App. The suit was settled by entry of a consent decree on August 19, 1977, which permitted the continued marketing of the joint ticket for a period of five years subject to certain restrictions. Exhibit 26, III App.

Defendant argued that apprehension over continued scrutiny by the Attorney General of Colorado under the consent decree was one of the factors which led it to discontinue the joint ticket after plaintiff refused to accept 12.5% as its share of revenues. I App. 121. On appeal, defendant's position is that "even if it abandoned the joint ticket as a conscious and unequivocal refusal to cooperate with [plaintiff] in the marketing of their respective facilities, it committed no antitrust violation." Brief of Defendant-Appellant, Cross-Appellee, at 7-8.

amount of costs and attorney's fees. *Id.* at 244. Defendant appeals, and plaintiff cross-appeals.[3]

I

The relevant market

On appeal, defendant contends that the district court erred in instructing the jury on the relevant market. The trial court's instructions on the market and submarket are reproduced in the Appendix to this opinion. Defendant argues that the instructions on the relevant product submarket and geographic submarket were inadequate, and that the court erred in instructing the jury that "[t]here can be both a relevant market and a relevant submarket." II App. 584-85. *See* Brief of Defendant-Appellant, Cross-Appellee, at 22-40. Plaintiff says that at trial, however, defendant did not object to the instructions on these grounds. Instead, defendant objected on the ground that the relevant market issue should be decided by the court as a matter of law and should not be submitted to the jury. II App. 580-81.

Rule 51 of the Federal Rules of Civil Procedure provides that "[n]o party may assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." Fed. R. Civ. P. 51. The purpose of this rule is to "prevent a litigant from taking advantage of an error which could be rectified by the court if called to its attention by timely and specific objection." *Corriz* v.

[3] Plaintiff does not seek a new trial. It asserts that the issues raised in its cross-appeal are "pertinent only if defendants are successful on their appeal." Opening Brief of Plaintiff-Appellee, Cross-Appellant, at 1. Because we affirm the trial court's judgment, we need not reach the arguments plaintiff advances in its cross-appeal.

Naranjo, 667 F.2d 892, 896 (10th Cir. 1981), *cert. granted*, 456 U.S. 971, *cert. dismissed*, 458 U.S. 1123 (1983) (by stipulation); *see also Moe* v. *Avions Marcel Dassault-Breguet Aviation*, 727 F.2d 917, 924 (10th Cir. 1984); *Taylor* v. *Denver and Rio Grande Western Railroad Co.*, 438 F.2d 351, 353 (10th Cir. 1971); 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2551 (1971).

Accordingly, Rule 51 requires counsel "to make abundantly clear to the trial court the objecting party's position." *Rogers* v. *Northern Rio Arriba Electric Cooperative, Inc.*, 580 F.2d 1039, 1042 (10th Cir. 1978); *see also Palmer* v. *Hoffman*, 318 U.S. 109, 119 (1943)("In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error."); *Community National Life Insurance Co.* v. *Porter Square Savings & Loan Association*, 406 F.2d 603, 606 (10th Cir. 1969)(objection to instruction "not sufficient because it was not distinct in explaining the grounds for objection as required by Rule 51"); 9 C. Wright & A. Miller, *supra*, § 2554, at 643 ("grounds must be stated with sufficient clarity"). We have indicated that the grounds stated in the objection must be obvious, plain, or unmistakable. *Corriz*, *supra*, 667 F.2d at 896 (objections on grounds that elements of cause of action were not proven as a matter of law and that there was no evidence to support submission of claim to jury "are shotgun objections which do not meet Rule 51's specificity requirement").

Defendant argues that it did object to the charge on relevant submarket and contends that it took action at trial to sufficiently apprise the district court of these grounds. Defendant points to (1) its objection at the conference on instructions, set out below, where it objected

to any submission of the market question to the jury; (2) its proposed instruction on market definition, which did not include instructions relating to submarkets; and (3) the argument made both in its trial memorandum and in its motion for a directed verdict that the relevant market, as a matter of law, could not be limited to Aspen, "and, *implicitly*, that there can be only one *relevant* market." Reply Brief of Defendant-Appellant, Cross-Appellee, at 2-3 (earlier emphasis added, later emphasis in original).

We note that at the conference in the district judge's chambers, during which both sides made their objections to the trial court's proposed instructions, counsel for the defendant made only the following objection to the relevant market instruction:

> Your Honor, Defendants would object to the instruction concerning relevant market contained on pages 16 through 18 of the instructions. While the defendants recognize that there is case authority supporting the submission of the relevant market—the relevant market question to the jury, we believe that on the record established in this case that the market definition of both the product market and the geographic market should be decided as a matter of law and should not be submitted to the jury.

XIV R. 2290[4]

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[4] The determination of the relevant market is generally a question of fact. *See Telex Corp.* v. *IBM*, 510 F.2d 894, 915 (10th Cir.) (per curiam), *cert. dismissed*, 423 U.S. 802 (1975); *see also Borough of Lansdale* v. *Philadelphia Electric Co.*, 692 F.2d 307, 311 (3d Cir. 1982); *Pinder* v. *Hudgins Fish Co.*, 570 F.2d 1209, 1220-21 (5th Cir. 1978); *Sulmeyer* v. *Coca Cola Co.*, 515 F.2d 835, 839 (5th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976); ABA Antitrust Section, *Antitrust Law Developments* 110-11 (2d ed. 1984). On that fact question, the defendant raises no issue in this appeal. Defendant concedes that "the evidence supporting the jury's findings on market definition is

A few pages later in the record of the conference on instructions, the judge said she would make one other comment concerning the defendant's request that the court rule as a matter of law on the question of the relevant market; that if she were to rule as a matter of law on the relevant market, she would rule that "the relevant market was Aspen and that the relevant product market was down-hill skiing services;" that after hearing defendant's witnesses she thought there was enough factual contest for the question to go to the jury; and that her not ruling as a matter of law was actually better for the defendant. XIV R. 2292. At that point defendant's counsel said: "Just so the record is clear, *our argument is that you should rule as a matter of law in our favor on that issue.*" *Id.* at 2292 (emphasis added). We feel this part of the record shows the intent of the defendant's objection to the market instructions and that it was not an objection directed to the form of the market and submarket portion of the charge, but was rather that the issue was for the court alone to decide.

Further, as noted the defendant did argue for a directed verdict on the theory that the evidence showed a larger market than just this Aspen area. IX R. 1450. And defendant says that its proposed instructions 13 through 16 "excluded any instruction on submarkets." Reply Brief of Defendant-Appellant, Cross-Appellee, at 2. The proposed instructions on product and geographic market are general statements on the tests for the jury to follow, they state detailed tests on both product and geographic market, and make no reference to any submarkets. I Supp. R. 87-90.

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irrelevant because this appeal does not present any issue as to the sufficiency of that evidence." Reply Brief of Defendant-Appellant, Cross-Appellee, at 7 n.3 (citation omitted).

We cannot agree that these statements and objections relied on stated "distinctly the matter to which [defendant] objects and the grounds of [its] objection," Fed. R.Civ.P. 51, so as to amount to a proper objection to the market and submarket formulation in the charge. We long have held that the offering of a proposed instruction does not preserve a challenge to the court's instructions under Rule 51, absent a specific objection. *See, e.g., Western Transmission Corp.* v. *Colorado Mainline, Inc.*, 376 F.2d 470, 474 (10th Cir. 1967); *Justheim Petroleum Co.* v. *Hammond*, 227 F.2d 629, 635 (10th Cir. 1955); *Jones* v. *Koma*, 218 F.2d 530, 531-32 (10th Cir. 1955); *see also Johnson* v. *House*, 704 F.2d 1049, 1051 (8th Cir. 1983)("The mere tender of an alternative instruction without objecting to some specific error in the trial court's charge or explaining why the proferred instruction better states the law does not preserve the error for appeal."). In the instant case, we cannot agree that defendant adequately apprised the district court of the grounds on which it now challenges the instructions given. As we stated in a similar context, "[t]he trial judge cannot be held to the standard of omniscience apparently envisioned by defendant[]." *Corriz*, *supra*, 667 F.2d at 896; *cf. Sunkist* v. *Winckler & Smith Co.*, 370 U.S. 19, 26-27 (1962) (when counsel made objections at conference on instructions before charge was given and requested instructions on basis of basis of objections, and after charge counsel was told all prior objections would be preserved, waiver did not occur in light of that assurance and prior objections and requests). We are persuaded that the record shows no proper and timely objection on the ground that the market and submarket part of the charge was erroneous.

Defendant says that if we do not agree that a proper objection was made on this ground, then we should con-

sider the point as plain error that generated a miscarriage of justice. Reply Brief of Defendant-Appellant, Cross-Appellee, at 3-4. However, where an objection to an instruction is not made before the jury retires for deliberation, we only review an instruction that is "patently plainly erroneous and prejudicial." *See Moe* v. *Avions Marcel Dassault-Breguet Aviation*, 727 F.2d 917, 925 (10th Cir. 1984); *Fiedler* v. *McKee Corp.*, 605 F.2d 542, 548 n.1 (10th Cir. 1979). In a civil case only rarely will we review an error in the instructions when no specific objection was made. *E.g.*, *Glasscock* v. *Wilson Constructors, Inc.*, 627 F.2d 1065, 1067-68 (10th Cir. 1980); *Fabian* v. *E. W. Bliss Co.*, 582 F.2d 1257, 1260 (10th Cir. 1978); C. Wright & A. Miller, *supra*, § 2558, at 672 ("[a]ctual reversals on basis of plain error are rare"). We have said that a new trial should be ordered in the absence of an objection below if an error in the instructions resulted in a "miscarriage of justice."[5] and we review instructions to which proper objection was not made only if they are "patently plainly erroneous and prejudicial."[6]

We cannot say that the district court's instructions on the relevant market resulted in a "miscarriage of justice"

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[5] *See Brown* v. *McGraw-Edison Co.*, ___ F.2d ___, ___ n.6 (10th Cir. 1984); *Fox* v. *Ford Motor Co.*, 575 F.2d 774, 786 (10th Cir. 1978).

[6] *Brown* v. *McGraw-Edison Co.*, ___ F.2d ___, ___ n.6 (10th Cir. 1984); *Moe* v. *Avions Marcel Dassault-Breguet Aviation*, 727 F.2d 917, 924 (10th Cir. 1984); *cf. Scholz Homes, Inc.* v. *Wallace*, 590 F.2d 860, 864 (10th Cir. 1979) ("plain and fundamental error").

We have also said that an error in an instruction to which there was no objection may be plain error if it was a "generating factor which culminated in a verdict not warranted under the law." *Herndon* v. *Seven Bar Flying Service, Inc.*, 716 F.2d 1322, 1330 (10th Cir. 1983), *cert. denied*, ___ U.S. ___, 52 U.S.L.W. 3791 (U.S. May 1, 1984); *see also Fox* v. *Ford Motor Co.*, 575 F.2d 774, 786 (10th Cir. 1978); *Pridgin* v. *Wilkinson*, 296 F.2d 74, 76 (10th Cir. 1961). We understand this to be merely a component of the inquiry whether the instruction was "patently plainly erroneous and prejudicial," or to have caused a "miscarriage of justice."

or were "patently plainly erroneous and prejudicial." Courts repeatedly have cautioned that the plain error exception is limited to exceptional cases where the error "has seriously affected the fairness, integrity or public reputation of judicial proceedings." *Rowe International, Inc.* v. *J-B Enterprises, Inc.*, 647 F.2d 830, 835 (8th Cir. 1981); *see also Morris* v. *Getscher*, 708 F.2d 1306, 1309 (8th Cir. 1983); *Dunn* v. *Sears, Roebuck & Co.*, 639 F.2d 1171, 1176 (5th Cir.), *modified on other grounds*, 645 F.2d 513 (5th Cir. 1981); *Whiting* v. *Jackson State University*, 616 F.2d 116, 126 (5th Cir. 1980); 9 C. Wright & A. Miller, *supra*, § 2558, at 675 ("If there is to be a plain error exception to Rule 51 at all, it should be confined to the exceptional case where the error has seriously affected the fairness, integrity, or public reputation of judicial proceedings."). The instructions here were not "hopelessly confusing"[7] and did not fail "to provide even the barest legal guideposts to aid the jury in rationally reaching a decision."[8] Accordingly, the plain error exception to Rule 51 should not be applied to upset the verdict here.

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[7] *Frederic P. Wiedersum Associates* v. *National Homes Construction Corp.*, 540 F.2d 62, 66 (2d Cir. 1976).

[8] *McNello* v. *John B. Kelley, Inc.*, 283 F.2d 96, 102 (3d Cir. 1960) (*quoted in Frederic P. Wiedersum Associates, supra*, 540 F.2d at 66); *see also Morris* v. *Getscher*, 708 F.2d 1306, 1309-10 (8th Cir. 1983) (instruction constituted plain error when it "provided the jury with virtually no guidance" and "essentially allowed the jury to arrive at a verdict through speculation or conjecture"); *Cruthirds* v. *RCI, Inc.*, 624 F.2d 632, 636 (5th Cir. 1980) (instruction that left "jury to speculate as to an essential point of law" was plain error).

In sum, we hold that defendant's attack on the relevant market instruction is not premised on a proper objection and that the circumstances do not justify setting aside the verdict and judgment on grounds not raised below.

II

Monopolization

Defendant argues that "there was insufficient evidence to present a jury issue of monopolization because, as a matter of law, the conduct at issue was pro-competitive conduct that a monopolist could lawfully engage in." Brief of Defendant-Appellant, Cross-Appellee, at 40. Defendant essentially reasons that plaintiff articulated six ways in which defendant's conduct allegedly constituted monopolization, and that none of these created an issue for the jury because none were anti-competitive.

In closing argument, plaintiff's counsel argued that defendant used its power "to deliberately exclude [plaintiff] from a substantial portion of the destination skier visits beginning in the 1977-'78 season, by doing six things:" (1) forcing plaintiff out of the four-area ticket by requiring that revenues be divided below plaintiff's market share; (2) substituting defendant's three area ticket for a four area ticket; (3) marketing and advertising its three mountains in a manner designed to convince consumers that Aspen had only three mountains, not mentioning Aspen Highlands; (4) making an agreement with a tour operator to sell defendant's tickets to the exclusion of plaintiffs; (5) refusing to accept plaintiff's coupons during the 1978-79 season; and (6) raising ticket prices for a

single-day lift ticket thus eliminating plaintiff's ability to offer a multi-area ticket.[9]

A. Waiver

In response to defendant's attack on plaintiff's six theories, plaintiff contends that defendant's argument "is largely a legal one," and because defendant failed to object to the instruction on monopolization, it is the law of the case. The thrust of plaintiff's argument is that defendant has waived its opportunity to challenge the sufficiency of the evidence under legal principles different from those announced in the instructions.

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[9] In its brief, defendant quotes the following passage from plaintiff's closing argument:

> The evidence has also shown that the Aspen Skiing Corporation, Buttermilk Skiing Corporation, and Snowmass Skiing Corporation together used that power to deliberately exclude Highlands from a substantial portion of the destination skier visits beginning in the 1977-'78 season by doing six things: (1) Imposing a condition that revenue must be divided on the four-area ticket based upon a fixed percentage substantially below the Aspen Highlands' market share previously realized, and to do so, to force Aspen Highlands out of the four area ticket; [2] as part of that, substituting their own three-area, six-day ticket which was provided in place of the four-area ticket and also provided for revenues being divided on the basis of usage; (3) marketing and advertising the Aspen resort in such a manner as to convince the newcomer to Aspen that Aspen only had three mountains rather than four mountains; (4) entering into special agreements with ARI, Aspen Reservations, Inc., the tour operator, for the purpose of inducing ARI, to sell Aspen Skiing Corporation tickets to the exclusion of Aspen Highlands' tickets; (5) refusing to accept Aspen Highlands Adventure Pack coupons during the '78-'79 season, again making it more difficult for Aspen Highlands to compete in the Aspen market; and (6) using their power to raise the individual daily lift ticket price this last year to $22, to completely eliminate Aspen Highlands' ability to offer a multi-area ticket in the Aspen market.

See Brief of Defendant-Appellant, Cross-Appellee, at 41; XIII R. 2214-15.

Defendant challenges the first, second, fifth and sixth theories reasoning that their validity hinges on whether defendant had a duty to cooperate with plaintiff, and that as a matter of law no such duty could have existed. *See* Brief of Defendant-Appellant, Cross-Appellee, at 42, 47, 56, 58. We agree that the validity of the above four theories is premised on the theory of a duty to cooperate. And we agree that defendant has preserved the right to challenge the sufficiency of the evidence of this theory to support the verdict.

Defendant moved for a directed verdict on two occasions. Each time it urged that there was no duty to cooperate. II App. 427-29; *id.* at 561-63 (renewed motion for directed verdict incorporating arguments made at close of plaintiff's case). This preserved defendant's opportunity to challenge the sufficiency of the evidence on that issue under the truly controlling law, regardless of defendant's failure to object to the jury instructions concerning a duty to cooperate. The Fifth, Seventh and Eighth Circuits have held that "[a] proper motion for a directed verdict and its denial will always preserve for review the question whether *under the law truly applicable to the case* there was an adequate evidentiary basis for the submission of the case to the jury." *Coca-Cola Bottling Co.* v. *Hubbard*, 203 F.2d 859, 862 (8th Cir. 1953)(emphasis added); *see also Dual Manufacturing & Engineering, Inc.* v. *Burris Industries, Inc.*, 619 F.2d 660, 662-63 (7th Cir.)(en banc), *cert. denied*, 449 U.S. 870 (1980); *Mid-America Food Service* v. *Ara Services, Inc.*, 578 F.2d 691, 696 n.4 (8th Cir. 1978); *House of Koscot Development Corp.* v. *American Line Cosmetics, Inc.*, 468 F.2d 64, 65-66 (5th Cir. 1972); *Johnson* v. *United States*, 434 F.2d 340, 343 (8th Cir. 1970); *Gorsalitz* v. *Olin Mathieson Chemical Corp.*, 429 F.2d 1033, 1040 n.5 (5th Cir. 1970); *Hanson* v. *Ford Motor Co.*, 278 F.2d 586, 593

(8th Cir. 1960). Thus, "in determining whether a trial court has erred in denying a motion for a directed verdict . . . , it is the applicable law that is controlling, and not what the trial court announces the law to be in his [or her] instructions." *Dual Manufacturing & Engineering, Inc.* v. *Burris Industries, Inc.*, 619 F.2d 660, 663 (7th Cir.)(en banc)(quoting *Coca-Cola Bottling* v. *Hubbard*, *supra*, 203 F.2d at 862), *cert. denied*, 449 U.S. 870 (1980). Therefore we will consider the validity of the theory that defendant had a duty to cooperate or deal with plaintiff in these circumstances.

B. Duty to cooperate or duty to deal

We must decide whether under the truly applicable law there was sufficient evidence for the jury to conclude that defendant's refusal to market a four-mountain ticket, together with defendant's other conduct, constituted monopolization in violation of § 2 as a refusal to cooperate, sometimes referred to as a refusal to deal.[10] Defendant replies that this case is not one where any such duty exists, arguing that such a duty can arise only in different circumstances where, through vertical integration, one firm has come to monopolize or control the supply of a component necessary for production, distribution or sale of a rival's product or service.[11] Brief of Defendant-

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[10] We are mindful that one of the damage years was 1977-78, and that a four-area ticket was offered in that year. We discuss the antitrust injury attributable to this year in *infra* Part III.

[11] Defendant relies on Areeda & Turner, who state that "[i]n general, the monopolist is under no duty to help his rivals enter, survive, or expand." 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 738m, at 286 (1978). Defendant says that while an exception must be made for bottleneck cases where through vertical integration a firm has come to monopolize or control a component essential for a rival's survival,

Appellant, Cross-Appellee, at 44 n.32; Reply Brief of Defendant-Appellant, Cross-Appellee, at 13-14.

The instances in which a monopolist has a duty to cooperate or deal is one of the most "unsettled and vexa-

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the "so-called 'bottleneck' cases are innapplicable here, however, because there is no claim that [defendant] is vertically integrated, or that it is the sole supplier of some component without which [plaintiff] absolutely cannot bring its product (here, service) to the market." Brief of Defendant-Appellant, Cross-Appellee, at 44-45 n.32. We reject defendant's argument.

We are not convinced that the essential touchstone of bottleneck cases is vertical integration. *See, e.g.*, P. Areeda & D. Turner, *Antitrust Law* ¶ 728b4, at 231 (1978) ("Of course, the integrated monopolist is subject to the same § 2 constraints as the non-integrated monopolist. An integrated monopolist cannot engage in refusals to deal tending unreasonably to exclude actual or potential rivals from his monopoly market."); L. Sullivan, *Handbook of the Law of Antitrust* § 48, at 131 (1977) ("As a matter of policy, to require the monopolist [with a natural advantage monopoly, but without a vertical link to the customer level] to treat all like firms in the same way—to have, one might say, a rational and relevant basis for any distinctions it may make—is to protect vertically related and adjacent markets from being distorted because of arbitrary decisions by the monopolist.").

We decline to adopt a narrow rule that would immunize an unintegrated monopolist from antitrust liability for refusing a competitor access to an essential facility in these circumstances. Vertical integration is not essential to finding a violation of the antitrust laws for a refusal to deal under the intent test. *See, e.g., Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951). We believe that it is also apparent that no bright light can be drawn between the bottleneck and intent cases. *See infra* note 13. Given this, and the need for a fact sensitive inquiry in this area, *e.g., Byars* v. *Bluff City News, Inc.*, 609 F.2d 843, 860 (6th Cir. 1980) (courts should "carefully analyze[] the fact situation before them to see whether defendants' conduct was anti-competitive . . . in a case where there is a unilateral refusal-to-deal by a monopolist."), we conclude in the circumstances of this case that the bottleneck doctrine is applicable.

tious" issues in antitrust law. *Byars* v. *Bluff City News Co., Inc.*, 609 F.2d 843, 846 (6th Cir. 1980). "There exist two conceptually similar lines of cases which impose a duty to deal upon a monopolist." *Id.* at 855; *see also MCI Communications* v. *AT&T*, 708 F.2d 1081, 1148 (7th Cir.) *cert. denied*, ___ U.S. ___, 104 S.Ct. 234 (1983).[12] First, there is the so-called essential facilities or bottleneck doctrine. "Under this approach, a business or group of businesses which controls a scarce facility has an obligation to give competitors reasonable access to it." *Byars, supra*, 609 F.2d at 856 & n.34 (citing *Associated Press* v. *United States*, 326 U.S. 1 (1945) (Associated Press enjoined from continuing its practice of refusing to furnish its service to its members' competitors); *United*

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[12] There are two elements to the offense of monopolization under § 2 of the Sherman Act. The first is "the possession of monopoly power in the relevant market." The second is "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States* v. *Grinnell, Corp.*, 384 U.S. 563, 570-71 (1966); *see also MCI Communications* v. *AT&T*, 708 F.2d 1081, 1106 (7th Cir.), *cert. denied*, 104 S.Ct. 234 (1983); *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 274 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980). Of course, the fact of injury and damages suffered by reason of a violation of the antitrust laws must also be shown for a private litigant to recover on a claim of monopolization. *E.g., Central National Bank* v. *Rainbolt*, 720 F.2d 1183, 1187 (10th Cir. 1983). The essentials of these elements were covered by the trial court's instructions. XIV R. 2304.

Defendant's challenge to the sufficiency of the evidence assumes, *arguendo*, that Aspen is the relevant market and that defendant had monopoly power in that market. *See* Brief of Defendant-Appellant, Cross-Appellee, at 40. Reply Brief of Defendant-Appellant, Cross-Appellee, at 7 n.3. (defendant's "appeal does not present any issue as to the sufficiency of [the] evidence" on "the jury's findings on market definition"). Thus, the first element under *Grinnell* necessary to establish a § 2 violation is not at issue.

States v. *Terminal Railroad Association*, 224 U.S. 383 (1912) (railroad companies jointly owning a terminal facility that was only feasible facility when coming to city from west must make facility available to non-proprietor railroads on non-discriminatory reasonable terms); *Gamco, Inc.* v. *Providence Fruit & Produce Bldg., Inc.*, 194 F.2d 484 (1st Cir.) (fruit wholesalers who jointly own a warehouse may not exclude competing wholesaler, absent some justification), *cert. denied*, 344 U.S. 817 (1952).

Second, in various contexts courts have employed an intent test under which a "business is free to deal with whomever it pleases so long as it has no 'purpose to create or maintain a monopoly.' " *Byars*, *supra*, 609 F.2d at 855 (quoting *United States* v. *Colgate & Co.*, 250 U.S. 300, 307 (1919)); *see also MCI*, *supra*, 708 F.2d at 1148. "These cases focus on the intent and competitive effect of the refusal to deal; not on whether the facility itself is 'essential.' " *MCI*, *supra*, 708 F.2d at 1148 (citing *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951) (newspaper publisher enjoined from refusing to accept advertisements from customers who advertised with competing radio station); *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359 (1927) (permissible for jury to infer that defendant's refusal to sell to plaintiffs was in pursuance of purpose to monopolize); *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919) (absent any purpose to create or maintain monopoly, Sherman Act does not restrict manufacturer's right to refuse to deal)).

We recognize that the cases do not fit neatly into these two categories. There is a significant amount of overlap between them.[13] Nevertheless the dichotomy, though in

[13] The overlap of the essential facilities doctrine and the intent test is "apparent upon examination of *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed. 2d 359 (1973)." *Byars*, *supra*, 609 F.2d at 857. In *Otter Tail*, the defendant was a vertically integrated power company. It had the capacity to produce power and transmit it over its own lines to municipalities, where it could sell the power at retail prices. When municipalities sought to replace the defendant at the retail level, defendant refused to sell power to the municipalities.

Relying on both the intent test and the bottleneck theory, the district court found that this refusal to deal violated the antitrust laws. *United States* v. *Otter Tail Power Co.*, 331 F. Supp. 54, 61 (D. Minn. 1971). The Supreme Court in its brief analysis did not distinguish between the two theories. *Otter Tail*, *supra*, 410 U.S. at 377-79; *see also Byars*, *supra*, 609 F.2d at 857. The Court held that the district court finding "that Otter Tail's refusal to sell at wholesale or to wheel were solely to prevent municipal power systems from eroding its monopolistic position" was supported. *Otter Tail*, *supra*, 410 U.S. 378.

For other cases discussing a duty to deal but not distinguishing between the essential facilities doctrine and the intent test, see, e.g., *Home Placement Service* v. *Providence Journal Co.*, 682 F.2d 274, 281 (1st Cir. 1982), *cert. denied*, ___ U.S. ___, 103 S. Ct. 1279 (1983); *Mid-Texas Communications, Inc.* v. *AT&T*, 615 F.2d 1372, 1387-88 & n.12 (5th Cir.) ("While in theory there exist differences between the two approaches, in practice the theories are similar."), *cert. denied*, 449 U.S. 912 (1980).

[14] Only general intent, not specific intent, is necessary to a finding of a § 2 violation of monopolization. *See Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 626 (1953); *United States* v. *Griffith*, 334 U.S. 100, 105-06 (1948). *But see Byars* v. *Bluff City News Co., Inc.*, *supra*, 609 F.2d at 859. "While the completed offense of monopolization under § 2 demands only a general intent to do the act, 'for no monopolist monopolizes unconscious of what he is doing,' a specific intent to destroy competition or build monopoly is essential to guilt for the mere attempt now charged." *Times-Picayune Co.*, *supra*, 345 U.S. at 626.

[15] Defendant relies on *Telex Corp.* v. *IBM*, 510 F.2d 894, 926 (10th Cir.) (per curiam), *cert. dismissed*, 423 U.S. 802 (1975), for the

part illusory, is a useful analytical tool.[14] On this record we conclude that both groups of cases apply and support the judgment here.[15]

(1). Essential facilities (or bottleneck)

The essential facilities or bottleneck doctrine has been applied in a variety of circumstances. In *Terminal Railroad*, the defendant railroads jointly owned the only feasible terminal for rail traffic coming to St. Louis from the west. The Court decreed that in the special circumstances of the terminal and bridge facilities, the railroad companies and terminal company should provide reasonable access to the facility for competing railroads. *Terminal Railroad, supra*, 224 U.S. at 411. In *MCI Communications* v. *AT&T, supra*, 708 F.2d at 1133, the doctrine was applied where the competing defendant system controlled access to the communications facility essential to operation of its competitor. The Seventh Circuit identified four elements necessary to establish liability under the essential facilities doctrine: (1) control of the essential facility by a monopolist; (2) a competitor's inability to duplicate the facility; (3) denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility. *MCI, supra*, 708 F.2d at 1132-33. Evidence was presented on these factors here.

First, there is no dispute that defendant controlled three of the four skiing mountains in the Aspen area. If defendant refuses to market a multi-day multi-mountain ticket with plaintiff, plaintiff cannot compete in the mar-

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proposition that its marketing of a three-mountain ticket was one of the "ordinary marketing methods available to all in the market," and therefore could not violate § 2 of the Sherman Act. Brief of Defendant-Appellant, Cross-Appellee, at 48.

We need not decide that it was or would be illegal to offer a three-mountain ticket in competition with the four-mountain ticket. We believe that all of the evidence should be examined together, and we do not consider defendant's marketing of a three-area ticket in isolation from its other conduct. *See infra* note 18.

ket for such tickets. Yet, defendant through its control of three of the four mountains can continue to offer such a ticket. We believe this is sufficiently analogous to *Terminal Railroad* to satisfy the element of control of an essential facility. Second, there was evidence concerning the difficulty of developing another ski area in Aspen due to regulatory restrictions, and delays, and the expense and time required to develop new mountains. *E.g.*, IV R. 377-79; VI R. 790-91; XII R. 2079-82. Third, there is no dispute that defendant denied the use of the "facility" to plaintiff. Defendant admits that it refused to continue to market a joint ticket with plaintiff. *See* Brief of Defendant-Apellant, Cross-Appellee, at 42-48. Fourth, there was evidence that it was feasible for defendant to provide access to the "facility." Prior to this litigation, plaintiff and defendant had marketed a joint multi-day multi-mountain ticket. There was testimony that defendants refused to accept coupons from plaintiff's Adventure Pack, although the coupons were at least as convenient as checks and credit cards. III R. 330-31.

We are not convinced by defendant's arguments based on its restrictive analysis that this is not a case of a vertical integration bottleneck. The substance of an essential facilities case was made. We must remember that this issue is raised by a claim of error in the denial of defendant's motion for a directed verdict and for judgment n.o.v. In that connection we must view the evidence most favorably to the party against whom the motion is made, and give that party the benefit of all reasonable inferences. *See, e.g., Hurd* v. *American Hoist and Derrick Co.*, ___ F.2d ___, ___ (10th cir. 1984); *Yazzie* v. *Sullivent*, 561 F.2d 183, 188 (10th Cir. 1977). We hold that in these circumstances there was sufficient proof to sustain the verdict on the basis of a duty to deal or cooperate, and wrongful refusal to deal.

(2). Intent

We likewise feel there was sufficient evidence for a finding against defendant on the basis that defendant's intent in refusing to market a multi-day multi-mountain ticket with plaintiff was to "create or maintain a monopoly." *Colgate, supra*, 250 U.S. at 307.[16] By refusing to cooperate with plaintiff, defendant became the only business in Aspen that could offer a multi-day multi-mountain skiing experience. This is an important factor to attract Aspen skiers who seek variety. I. App. 191, 243. There was evidence that defendant refused to offer a four mountain ticket, despite skiers' frustration over its unavailability. II App. 525-33.

[16] Defendant argues that "[t]he verdict cannot be construed as based on a finding that [defendant's] refusal to cooperate was intended, or was motivated by a purpose or desire, to achieve or maintain monopoly power" because the trial court "instructed the jury that no such finding was necessary." Brief of Defendant-Appellant, Cross-Appellee, at 47 n.34. We must reject defendant's argument.

There was no proper or timely objection to the formulation of the intent instruction, as required by Rule 51. Fed. R. Civ. P. 51. Moreover, the charge correctly stated that "[w]illfully as used in these instructions means acting knowingly and deliberately, but it does not mean that [defendant] must have specifically intended to achieve or maintain monopoly power." XIV R. 2310. Under § 2 general intent is all that is required to support a monopolization claim; only for a mere attempt to monopolize is specific intent required to be shown. *E.g., Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 626 (1953); *United States* v. *Griffith*, 334 U.S. 100, 105-06 (1948); *Home Placement Service* v. *Providence Journal Co.*, 682 F.2d 274, 281 (1st Cir. 1982), *cert. denied*, 103 S.Ct. 1279 (1983); *see also Bank of Utah* v. *Commercial Security Bank*, 369 F.2d 19, 26 (10th Cir. 1966), *cert. denied*, 386 U.S. 1018 (1967). *But see Byars* v. *Bluff City News Co.*, 609 F.2d 843, 859 (6th Cir. 1980). The trial judge was instructing the jury as to the elements of the offense of monopolization, not an attempt to monopolize, and she properly instructed that specific intent was not an element of that offense.

To compete with defendant's three-mountain ticket, plaintiff developed an "Adventure Pack." This was a six day ticket designed to permit skiers to ski three of the six days at defendant's mountains. To do this, plaintiff included vouchers in the packet that theoretically were negotiable at defendant's ticket windows. Although there was evidence that these vouchers were guaranteed by a bank, and easier to accept than checks or charge cards, defendant refused to accept them. III R. 328-35. After plaintiff modified its Adventure Pack to eliminate any of defendant's objections, IV R. 504-05, defendant raised the price of its single-day ticket to $22.00, thereby making it unprofitable for plaintiff to market its Adventure Pack. IV R. 534-35; IX R. 1424-25.

We hold that there was sufficient evidence for the jury to conclude that defendant's refusal to market a four-mountain ticket,[17] considered together with its other conduct, showed its intent to create or maintain a monopoly and thus a violation of § 2.[18]

[17] The trial judge's charge referred to the duty to cooperate with a business rival and said that a refusal to deal with a competitor "does not violate Section 2 if valid business reasons exist for that refusal." XIV R. 2311.

[18] Defendant argues that each of the "six things" on which plaintiff relied to demonstrate that it was deliberately excluded from the destination skier market must be supported by sufficient evidence to support a § 2 verdict. *See supra* note 9. Defendant reasons that if we "uphold[] the legal sufficiency and proof of one or more, but not all, of [plaintiff's] theories, then [defendant] is entitled to a new trial." Brief of Defendant-Appellant, Cross-Appellee, at 59-60.

Defendant relies on *Northeastern Telephone Co.* v. *AT&T*, 651 F.2d 76 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982) for the above

III

Injury

Defendant argues that even assuming that it abused its monopoly power, plaintiff cannot recover because it has

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proposition. In *Northeastern*, the Second Circuit reversed and held that plaintiff failed to prove five of the six types of conduct it alleged were anti-competitive. Because the interrogatories submitted to the jury did not permit the court to determine whether the jury based its damage award on any of the five types of conduct that plaintiff had failed to prove were anti-competitive, the Second Circuit remanded for a new trial. We cannot agree that each one of the "six things" which plaintiff argued demonstrated abuse of monopoly power, taken alone, must be supported by sufficient evidence to find a § 2 violation. We reach this conclusion for two reasons.

First, defendant's argument would require that we view each of the "six things" in isolation. To do this however would be contrary to the Supreme Court's admonition that an antitrust plaintiff "should be given the full benefit of [its] proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962); *see also Associated Press* v. *United States*, *supra*, 326 U.S. at 14; *Northeastern Telephone* v. *AT&T*, *supra*, 651 F.2d at 95 n.28 (recognizing rule in *Continental Ore* but distinguishing it where proof was "utterly lacking" in "numerous critical respects"); *Case-Swayne Co.* v. *Sunkist Growers, Inc.*, 369 F.2d 449, 459 (9th Cir. 1966), *cert. denied*, 387 U.S. 932, *rev'd on other grounds*, 389 U.S. 384 (1967); *GVF Cannery, Inc.* v. *California Tomato Growers Association, Inc.*, 511 F. Supp. 711, 716 (N.D. Cal. 1981). Plaintiff's evidence should be viewed as a whole. Each of the "six things" viewed in isolation need not be supported by sufficient evidence to amount to a § 2 violation. It is enough that taken together they are sufficient to prove the monopolization claim.

Second, defendant never objected to the instructions that required the jury to consider the evidence as a whole. XIV R. 2295 (jury instruction); XIV R. 2290-92 (defendant's objections to instructions). In fact, the trial judge instructed that the plaintiff is "not required to prove every one of its allegations about anti-competitive conduct.

failed to establish that defendant's unlawful conduct caused plaintiff injury in its business or property. Such injury is an essential element that plaintiff must prove to recover under the antitrust laws. *E.g.*, *Central National Bank* v. *Rainbolt*, 720 F.2d 1183, 1187 (10th Cir. 1983); *Mountain View Pharmacy* v. *Abbott Laboratories*, 630 F.2d 1383, 1389 (10th Cir. 1980); *World of Sleep, Inc.* v. *Stearns & Foster Co.*, 525 F.2d 40, 43-44 (10th Cir. 1975). Plaintiff's damage evidence covered four skiing seasons—1977-78 through 1980-81—and included expert testimony on such damages with estimates ranging from $3,162,100 to $4,708,600. *See, e.g.*, Plaintiff's Exhibit 101.

Defendant reasons that plaintiff sought to show that its business would have been more profitable if defendant had agreed to market a four-mountain ticket and had not marketed its own three-mountain ticket; that the only evidence that plaintiff relied on to show this was that of its

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Once again, you have a problem for judgment, for thorough and sensitive weighing of the evidence." XIV R. 2213-14. Moreover, defendant did not submit more specific interrogatories that would have required the jury to make the grounds for its decision clear. I R. 143-45 (defendant's special interrogatories on monopolization). In these circumstances, we should uphold the general verdict if the proof on various theories is sufficient to sustain the general verdict. *See e.g.*, *Union Pacific Railroad Co.* v. *Lumbert*, 401 F.2d 699, 701 (10th Cir. 1968) (absent pertinent objection to charge or request for specific interrogatory, a general verdict is upheld where there is substantial evidence supporting any ground of recovery in favor of an appellee); *see also Malandris* v. *Merrill Lynch, Pierce, Fenner & Smith Inc.*, 703 F.2d 1152, 1176-77 n.20 (10th Cir. 1981), (en banc) (plurality opinion) *cert. denied*, 104 S.Ct. 92 (1983); *Comins* v. *Scrivener*, 214 F.2d 810, 814 (10th Cir. 1954). In the instant case, we hold that there is sufficient evidence to find that defendant had a duty to cooperate in marketing a four-mountain ticket, and that its refusal to do so, considered together with its other acts, supported the finding of monopolization.

expert, Mr. Farwell; and that this testimony should have been excluded because it was grounded on two false assumptions. *See* Brief of Defendant-Appellant, Cross-Appellee, at 60-62; Reply Brief of Defendant-Appellant, Cross-Appellee, at 15-16. We reject defendant's argument for two independent reasons.

First, there was sufficient evidence of injury, other than Farwell's testimony, to sustain the jury verdict. For example, plaintiff's president and owner, II R. 149, testified that plaintiff was "severely damaged" by defendant's refusal to market a four-mountain ticket. III R. 197; *see also id.* at 195. Plaintiff's financial vice president, IX R. 1374, testified that elimination of the four-mountain ticket had the effect of a loss of revenues during the 1978-79, 1979-80, and 1980-81 skiing seasons; he made projections assuming that plaintiff's "slice of the pie" would stay the same and made a rough estimation of a 50-60% loss attributable to the marketing practices of defendant. IX R. 1386-91, 95. He also testified that as a result of eliminating the four-mountain ticket, plaintiff became "a day ski area in a destination market." IX R. 1425. Moreover, there was testimony that because of the elimination of the four-mountain ticket plaintiff had to decrease the number of its ski patrolmen. IV R. 477. There was sufficient evidence for the jury to conclude that plaintiff proved that it was injured by defendant's unlawful conduct.

Second, we reject defendant's argument that the testimony and exhibits of plaintiff's expert[19] were grounded on

[19] Plaintiff's expert was Ted Farwell of Boulder, Colorado. Mr. Farwell was a ski area planner, consultant and appraiser, with a bachelor's and master's degree in business administration, and 20 years' experience in his field. VIII R. 1163. He was a former competitive skier himself, skiing for the University of Denver, and on three United States Olympic teams. *Id.* at 1170.

two false assumptions, and therefore were inadmissible. Defendant says that the validity of the expert testimony "depended explicitly on two indispensable assumptions: (1) that [plaintiff's] ski areas and those of [defendant] 'are equally desirable in the mind of the consumer;' and, (2) that [defendant] would not offer its own 3-area 6-day ticket during the damage period to attract customers away from the jointly-offered 4-area ticket." Brief of Defendant-Appellant, Cross-Appellee, at 62 (citations omitted) (footnote omitted).

Although Farwell's assumptions may have been open to question, they were not so unsupported that the trial court abused its discretion in permitting admission of the testimony and exhibits. We begin with the general rule that we review a district court's admission or exclusion of expert testimony for abuse of discretion only. *E.g.*, *Scholz Homes, Inc.* v. *Wallace*, 590 F.2d 869, 863 (10th Cir. 1979) ("Trial courts have broad discretion in determining the extent to which expert testimony is admissible."); *see also Garwood* v. *International Paper Co.*, 666 F.2d 217, 223 (5th Cir. 1982) ("the district court's admission or exclusion of expert testimony under Fed.R.Evid. 702 is reviewable only for abuse of discretion").

We cannot say that the admission of this expert testimony was an abuse of discretion. Although there may have been considerable evidence contradicting the expert's assumptions, his assumptions were not without support.[20] *See also Litton Systems, Inc.* v. *A T & T*, 700

[20] There was evidence that plaintiff's mountain was of equivalent desirability to defendant's mountains. There was testimony that plaintiff's mountain was "the finest, well-balanced mountain in the Aspen area." IV R. 502. One witness testified that he "prefer[ed] [plaintiff's mountain] as a ski area," and that he recommended plain-

F.2d 785, 822-25 (2d Cir. 1983) (expert's damage projections admissible because assumptions on which they were based were supported in record), *cert. denied*, ___ U.S. ___, 104 S.Ct. 984 (1984). Moreover, "the full burden of exploration of the facts *and assumptions* underlying the testimony of an expert witness [is] squarely on the shoulders of opposing counsel's cross-examination." *Smith* v. *Ford Motor Co.*, 626 F.2d 784, 793 (10th Cir. 1980)(emphasis added), *cert. denied*, 450 U.S. 918 (1981).[21] We therefore conclude that permitting the jury

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tiff's ski school over the others because it is a "friendly area." VII R. 983; *see also id.* at 985-86. There was also testimony from a member of defendant's board of directors that if a four-mountain ticket had been offered in 1978-79, defendant would *not* have marketed its three-mountain ticket at the same time. Exhibit. 33, III App.; V R. 585.

[21] Defendant also argues that Farwell's projections "were attributed at least in part to what the trial court found to be [defendant's] *lawful* competition—its offering of its own 3-area ticket." Brief of Defendant-Appellant, Cross-Appellee, at 66 (emphasis in original). Defendant argues that the judgment must be reversed because, as in *Coleman Motor Co.* v. *Chrysler Corp.*, 525 F.2d 1338 (3d Cir. 1975), plaintiff's expert relied on defendant's lawful conduct in projecting damages. We disagree for two reasons.

First, we have explained above that we must look at the evidence as a whole in determining whether defendant violated § 2. Whatever the propriety of marketing its own three-day ticket in other circumstances, we must conclude that defendant cannot complain of Farwell's reliance on its offering of the three-day ticket in conjunction with the other evidence of monopolization in this case, especially where defendant has acquiesced in the jury's return of a general verdict. "But however innocent such agreements might be, standing alone, they would assume quite a different aspect if utilized as essential features of a program to hamper or destroy competition." *Associated Press*, *supra*, 326 U.S. 14.

Second, Farwell's projections do not assume that the three-day ticket is illegal. Instead, the projections merely assume that defend-

to consider the testimony from plaintiff's expert was not an abuse of discretion.[22]

Defendant also argues that plaintiff failed to show that it was injured by reason of an antitrust violation for the 1977-78 ski season. Defendant contends that a four-mountain ticket was offered in 1977-78 and therefore any injury suffered by plaintiff during this season was based on defendant's lawful offering of its own three-area ticket. Brief of Defendant-Appellant, Cross-Appellee, at 76-78; Reply Brief of Defendant-Appellant, Cross-Appellee, at 19-21.

This argument ignores the evidence before the jury of antitrust injury suffered by plaintiff in having to accept 15% as its share of net revenues from the sale of four-area

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ant would refrain from offering the three-day ticket. As we have explained earlier, there is support in the record for this assumption. *See supra* note 20.

[22] Defendant makes a broad challenge to the admission of the testimony of plaintiff's expert. In addition to the challenge that the testimony was inadmissible because grounded on false assumption which we have rejected, defendant also argues that even if the expert evidence was otherwise admissible it should have been excluded as misleading and confusing. *See* Fed.R.Evid. 403. Brief of Defendant-Appellant Cross-Appellee at 68. We note that under Rule 403, Fed. R.Evid., the "task of balancing the probative value of evidence against danger of confusion of the issues is one for which the trial judge because of his [or her] familiarity with the full array of evidence in the case, is particularly suited." *Rigby* v. *Beech Aircraft Co.*, 548 F.2d 288, 293 (10th Cir. 1977). We will not disturb the trial court's decision on this issue unless it is an abuse of discretion. *See, e.g.*, *Whiteley* v. *OKC Corp.*, 719 F.2d 1051, 1057 (10th Cir. 1983); *Texas Eastern Transmission Corp.* v. *Marine Office-Appleton & Cox Corp.*, 579 F.2d 561, 567 (10th Cir. 1978); *Rigby* v. *Beech Aircraft Co.*, 548 F.2d 288, 293 (10th Cir. 1977). We cannot say it was an abuse of discretion to refuse to exclude the expert's testimony under Rule 403.

tickets during 1977-78. Plaintiff's counsel contended in closing argument that defendant had used its market "power to deliberately exclude [plaintiff] from a substantial portion of the destination skier visits beginning in the 1977-'78 season by [, among other things,] [i]mposing a condition that revenue must be devided on the four-area ticket based upon a fixed percentage substantially below [plaintiff's] market share previously realized, and to do so, to force [plaintiff] out of the four-area ticket." II App. 574.

In years preceding 1977-78, revenues from the sale of the joint four-area tickets were divided on the basis of actual use. In all but one of these seasons, plaintiff received between 16.8% and 18.5% of the revenues based on actual use of its facility. Only during 1976-77, a season that plaintiff contended was marked by below average amounts of snowfall and an unusually low number of skiers visiting the Aspen area, did plaintiff's share of the revenues based on actual use fall below 16.8%. Its share during this season was 13.2%. Defendant offered to continue the joint ticket for 1977-78 if plaintiff would accept a 13.2% fixed percentage of the revenues. III R. 270-71. Plaintiff objected to this percentage because it was based on the survey for 1976-77. *Id.* at 271. Plaintiff's vice president testified that "it looked pretty obvious to us that [defendant] had no intention of really having a four-area, six-day ticket with us, and we felt that our own [sic] chance of keeping this thing alive was to accept some type of a fixed percentage, because [defendant was not] going to go along with a survey [of actual use]." *Id.* at 273. As a result, plaintiff offered a "compromise" deal in which it would accept the average of its previous three years as its share of the revenue for 1977-78. *Id.* The parties eventually settled on 15% as plaintiff's share of the revenues for the 1977-78 season.

We conclude that there was sufficient evidence for the jury to conclude that plaintiff was injured through the exercise of monopoly power by defendant's acts in compelling plaintiff to accept 15% as its share of the profits from the joint four-area ticket during the 1977-78 season, rather than dividing revenues on the basis of actual use. And of course, with respect to the 1978-79, 1979-80, and 1980-81 years defendant did refuse to deal with plaintiff in the marketing of a four-mountain ticket, in addition to its other acts.

The expert testimony thus supported the jury inference of injury in fact resulting from defendant's violation of § 2, and the testimony of other witnesses as well. In sum, the requirement of proof of injury as an element of plaintiff's case was met. *King & King Enterprises* v. *Champlin Petroleum Co.*, 657 F.2d 1147, 1156, 1160 (10th Cir. 1981), *cert. denied*, 454 U.S. 1064 (1982).

IV

Damages

Lastly, defendant takes issue with the proof supporting the jury's award of $2.5 million in damages, which the district court trebled to $7.5 million. Defendant again challenges the testimony and exhibits of plaintiff's expert Farwell. Defendant contends that Farwell's damage estimates of $4,708,600 under his "Method A" and $3,162,100 under "Method B" are an inadequate foundation for the jury's damage award. Farwell's "Method A" estimate of damages was based on the assumption of a trend of the market share continuing in favor of plaintiff through the damage years projected. Farwell estimated the before tax profit that would have been produced if the defendant's marketing practices had not changed; this method produced the $4,708,600 estimate of damages. Farwell's

"Method B" was more conservative and assumed that the plaintiff would only continue to have the average market share of recent prior years through the damage years projected; this method produced the $3,162,100 estimate of loss resulting from defendant's change in marketing practices.

The Supreme Court has recognized that an antitrust plaintiff is rarely able to prove its damages with mathematical precision. *See, e.g., J. Tavett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 566 (1981) ("The vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of defendant's antitrust violation."); *Zenith Corp.* v. *Hazeltine*, 395 U.S. 100, 123 (1962) ("damages issue in [cases where plaintiff was partially or totally excluded from a market] are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts"); *see also King & King Enterprises* v. *Champlin Petroleum Co.*, 657 F.2d 1147, 1158 (10th Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982); *Cackling Acres, Inc.* v. *Olson Farms, Inc.*, 541 F.2d 242, 246 (10th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977). The Court has emphasized that the trier of fact can determine the amount of damages from "a just and reasonable estimate of the damage based on relevant data." *Bigelow* v. *RKO Radio Pictures*, 327 U.S. 251, 264 (1946). The damage award, however, may not be based on "speculation or conjecture." *Id.*

In Part IV, *supra*, we rejected defendant's challenge to the testimony and exhibits of plaintiff's expert Farwell in the context of proving injury. We similarly must reject defendant's argument concerning the inadequacy of the proof concerning damages, particularly in light of the general rule that "the burden of proving the amount of

damages is less than that required for proving the fact of damage." ABA Antitrust Section, *Antitrust Law Developments* 409 (2d ed. 1984); *see also Story Parchment Co.* v. *Patterson Parchment Co.*, 282 U.S. 555, 562 (1931). As we stated in a similar context:

> If the calculations upon which the loss of profits are based are *estimated in any reasonable way* and the underlying assumptions on which the [expert] relied *are not without support in the record*, the calculations may be upheld as a valid means of measuring loss of profits.

King & King Enterprises, supra, 657 F.2d at 1158. (emphasis added). In light of Farwell's testimony and exhibits, we cannot say that the jury's $2.5 million damage award was based on "speculation or conjecture." *See id.* at 1162-63 ("The weight and probative value of [experts'] testimony was for the jury to decide. . . . 'Even though we may not agree with each step in the [fact finder's] reasoning process, we must affirm . . . unless the findings are beyond the pale of sane judgment.' " (quoting *Trabert & Hoeffer, Inc.* v. *Piaget Watch Corp.*, 633 F.2d 476, 484 (7th Cir. 1980)); *see also Midwest Underground Storage* v. *Porter*, 717 F.2d 493, 501 (10th Cir. 1983) (upholding jury damages award that was "within the range of the evidence," even though exact amount of award was open to question).

Defendant also argues that the $2.5 million damage award is excessive. The district court rejected defendant's motion for a new trial based, in part, on the claim that the damage award was "grossly excessive." I R. 212; I App. xviii. We must afford the district court's refusal to grant a new trial on the excessive damages claim "considerable deference on appeal." *Blevins* v. *Cessna Air Craft Co.*, 728 F.2d 1576, 1579 (10th Cir. 1984); *see also*

Midwest Underground Storage Inc., 717 F.2d at 502 ("The decision whether to grant a new trial is committed to the informed discretion of the district court, which is generally in a better position to evaluate claims of jury confusion or other error in the verdict.") "Moreover, 'absent an award so excessive as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption or other improper cause invaded the trial, the jury's determination of the damages is considered inviolate.' " *Blevins*, *supra*, 728 F.2d at 1579 (quoting *Malandris* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 703 F.2d 1152, 1168 (10th Cir. 1981) (en banc) (plurality opinion), *cert. denied*, ___ U.S. ___, 104 S.Ct. 92 (1983)); *see also Hurd* v. *American Hoist and Derrick Co.*, ___ F.2d ___, ___ (10th Cir. 1984).

We cannot say that the district court abused its discretion in denying defendant's motion for a new trial on the basis of the alleged excessiveness of the verdict or that the $2.5 million award is so excessive as to shock the judicial conscience. Indeed, the jury's award was below the estimates of plaintiff's expert Farwell, whose testimony we held to be admissible in *supra* Part III.[23] De-

[23] Defendant criticizes Farwell's damage estimate for 1977-78 on the ground that the four-mountain ticket *was* actually offered during this year, contrary to the apparent assumption of Exhibit 101. However, this defect is not fatal to the verdict when we consider the amount of damages attributed to this year in comparison with the other damage years. Under his more conservative Method B, Farwell attributed between $884,400 and $991,300 in damages for each of the years 1978-79 through 1980-81, during which the four-mountain ticket was not offered. The total damages attributed by Farwell to these three years was over $2.8 million, which was greater than the jury's damage award for the four damage years in question. Farwell's estimate of $354,300 in damages for 1977-78, during which the four-mountain ticket was offered, therefore should be viewed in light of Farwell's estimated damages for 1978-79 through 1980-81 and the actual damages awarded by the jury. *See Midwest Underground Storage, Inc.*, *supra*, 717 F.2d at 501 (upholding jury damages award that was "within the range of the evidence").

fendant's other challenges to certain aspects of the exhibits on which Farwell relied, *see* Brief of Defendant-Appellant, Cross-Appellee, at 79-80, do not convince us that overturning the jury's damage award is appropriate here.

V

Attorneys' fees and costs on appeal

Plaintiff asks that we award it "costs, including reasonable attorneys' fees, on appeal." Reply and Answer Brief of Plaintiff-Appellee, Cross-Appellant, at 84. Section 4 of the Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover . . . the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15(a).

In *Perkins* v. *Standard Oil Co.*, 399 U.S. 222 (1970), the Supreme Court held that § 4 of the Clayton Act "authorize[s]) the award of counsel fees for legal services performed at the appellate stages of a successfully prosecuted private antitrust action." *Id.* at 223; *see also Alexander* v. *National Farmers Organization*, 696 F.2d 1210, 1211-12 (8th Cir. 1982), *cert. denied*, ___ U.S. ___, 103 S.Ct. 2108, 2110 (1983); *Moore* v. *Jas. H. Matthews & Co.*, 682 F.2d 830, 839 & n.11 (9th Cir. 1982); *Carpa, Inc.* v. *Ward Foods, Inc.*, 536 F.2d 39, 55-56 (5th Cir. 1976); *see generally* 2 S. Speiser, *Attorneys' Fees* § 14:6 (1973). The Supreme Court in *Perkins* indicated that "[t]he amount of the award for such services should, as a general

rule, be fixed in the first instance by the District Court, after hearing evidence as to the extent and nature of the services rendered." 399 U.S. at 223.

Accordingly we remand to the district court to hold a hearing on the appropriate amount of attorneys' fees and costs incurred by plaintiff which are attributable to the appeal in No. 82-1407. With respect to the cross-appeal in No. 82-1424, the issues raised were only to be considered if defendant Aspen Skiing Company was successful in its appeal. *See* note 3, *supra*. In view of these circumstances, we conclude that each side should bear its own appellate costs and attorneys' fees which are attributable to the cross-appeal. On remand the district court should thus determine the appellate costs and attorneys' fees attributable to the appeal in No. 82-1407 and award those costs and attorney's fees to plaintiff.

VI

Conclusion

We are satisfied that the trial was fairly conducted, that the instructions were balanced and fair to both sides, and that no error is demonstrated. Accordingly in all respects the judgment of the district court is affirmed, and the case is remanded to the district court for further proceedings concerning appellate attorney's fees and costs as provided in Part V.

APPENDIX

The district court's relevant market instruction was as follows:

> A relevant market has two components: One is the product market and the other is the geographic market.
>
> Product market: The parties are in disagreement as to what the relevant product market is. Aspen Highlands claims that downhill skiing services in Aspen, including multi-area, multi-day lift tickets is the relevant product market. Aspen Skiing Corporation and its subsidiaries claim that the relevant product market is downhill at destination ski resorts.
>
> Like many issues of fact, this one calls upon you to apply your collective common sense and experience to the record of evidence before you.
>
> The basic idea of a relevant product market is that the product or services within it can be substituted for each other as a practical matter from the buyer's point of view. Two products need not be identical to be in the same market, but they must be as a matter of practical fact in the actual behavior of consumers substantially or reasonably interchangeable to fill the same consumer needs or purposes. Two products are within a single market if one item could suit buyers' needs substantially as well as the other.
>
> One way you can tell whether products are reasonable substitutes for each other is to consider whether changes in the price of one have fairly direct and substantial effects upon the sales of the other. If so, the products are probably in the same market. You can also consider how people in the industry and the public at large view the products, whether the products have similar prices, whether the products are sold to similar customers, and whether they are sold by the same kind of sellers. Other factors which you should consider include the special characteristics

and uses of each product and the overlap between the consumers of different products.

In sum, you are being asked to decide which products compete with each other. No one factor is necessarily decisive; but the more of these criteria that are present, the more likely the particular market is a separate product or service market.

Sub-markets: Once you have determined the relevant product market, you next have to consider whether or not there exists within that product market a relevant sub-market. Even though a group of products are sufficiently interchangeable to be grouped in one product market, there may be within that group a smaller group of products that compete so directly with each other as to constitute a sub-market with in [sic] the larger market; or the products or services of a particular seller may have such particular characteristics and such particular consumer appeal and are sufficiently insensitive to price variations of other products that they constitute a relevant sub-market all by themselves.

There can be both a relevant market and a relevant sub-market or just a relevant market without any relevant sub-market. Thus, if you decide that the relevant product market is downhill skiing at destination ski resorts, you must still determine whether downhill skiing services in Aspen, including multi-area, multi-day lift tickets is a sub-market within the larger market.

Relevant geographic market: Second, you must determine [the] relevant geographic market. The relevant geographic market is the area or areas in which these parties and their competitors compete for the sale of products that form the relevant product market. It is the area or areas to which a potential customer may rationally turn for the service or product he needs.

Just as there can be a sub-market within a relevant product market, there can be a sub-market within a relevant geographic market. Your destination [sic] of the geographic market or sub-market must both correspond tc the commerical realities of the ski industry and be economically significant. Thus, although the geographic market in some instances may be national or international, under other circumstances it may be as small as a single town or resort area.

In this case, Aspen Highlands contends that the relevant geographic market is the Aspen area, while Aspen Skiing Corporation and its subsidiaries contend that it is North America. Thus, if you decide that the relevant product market is downhill skiing at destination ski resorts and the relative georgraphic [sic] market North America, you may still consider whether downhill skiing services in Aspen, including multi-area, multi-day lift tickets from a relevant product sub-market, and if so, whether the Aspen area is a relevant geographic sub-market.

XIV R. 2305-08.

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MAY TERM - July 13, 1984

Before Honorable William J. Holloway, Jr., Honorable William E. Doyle, and Honorable Stephanie K. Seymour, Circuit Judges

ASPEN HIGHLANDS SKIING CORPORATION,
a Delaware Corporation,
Plaintiff-Appellee,
Cross-Appellant,

v.

ASPEN SKIING COMPANY,
a Colorado General Partnership,
Defendant-Appellant,
Cross-Appellee.

JUDGMENT

Nos. 82-1407
and 82-1424
(D.C. No. 79-Z-1012)

This cause came on to be heard on the record on appeal from the United States District Court for the ____ District of Colorado ____ , and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed. The cause is remanded to the United States District Court for the District of Colorado for further proceedings in accordance with the opinion of this court.

HOWARD K. PHILLIPS, Clerk

JULY TERM - July 31, 1984

Before Honorable William J. Holloway, Jr., Honorable William E. Doyle, and Honorable Stephanie K. Seymour, Circuit Judges

ASPEN HIGHLANDS SKIING CORPORATION,
Plaintiff-Appellee,
Cross-Appellant,

v.

ASPEN SKIING COMPANY,
Defendant-Appellant,
Cross-Appellee.

Nos. 82-1407
and 82-1424

This matter comes on for consideration of appellant/cross-appellee's motion for stay of mandate until September 2, 1984, pending application for writ of certiorari in the captioned cause.

Upon consideration whereof, it is ordered that the mandate is stayed until September 2, 1984, pending certiorari and that if, on or before that date, there is filed with the Clerk of the Court of Appeals a notice from the Clerk of the Supreme Court of the United States that a timely petition for writ of certiorari has been filed in the Supreme Court, the stay shall continue until final disposition by the Supreme Court.

HOWARD K. PHILLIPS, Clerk

By /s/ _____
ROBERT L. HOECKER
Chief Deputy Clerk

JULY TERM - August 28, 1984

Before Honorable William J. Holloway, Jr., Honorable William E. Doyle, and Honorable Stephanie K. Seymour, Circuit Judges

ASPEN HIGHLANDS SKIING CORPORATION,
Plaintiff-Appellee,
Cross-Appellant,

v.

ASPEN SKIING COMPANY,
Defendant-Appellant,
Cross-Appellee.

Nos. 82-1407
and 82-1424

This matter comes on for consideration of appellant Aspen Skiing Company's motion for a second stay of issuance of the mandate pending petition for certiorari.

Upon consideration whereof, the motion is granted. The issuance of the mandate is ordered stayed to and including October 2, 1984, pending the appellant's filing of its petition for certiorari, in the United States Supreme Court.

HOWARD K. PHILLIPS, Clerk